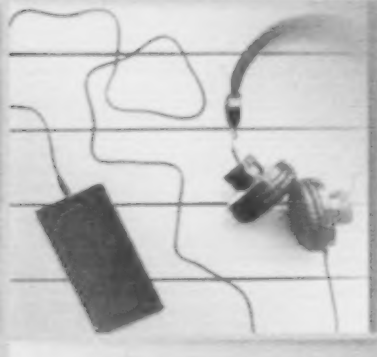

ANNUAL REPORT
2016-17

Copyright Board of Canada

Copyright Board
of Canada

Commission du droit d'auteur
du Canada

August 31, 2017

The Honourable Navdeep Bains, P.C., M.P.
Minister of Innovation, Science and Economic Development
Ottawa, Ontario
K1A 0A6

Dear Minister:

I have the honour of transmitting to you for tabling in Parliament, pursuant to section 66.9 of the *Copyright Act*, the twenty-ninth Annual Report of the Copyright Board of Canada for the financial year ending March 31, 2017.

Yours sincerely,

Claude Majeau

Claude Majeau
Vice-Chairman and
Chief Executive Officer

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Telephone: (613) 952-8621
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BOARD MEMBERS AND STAFF

AS OF MARCH 31, 2017

Chairman:	The Honourable Robert A. Blair
Vice-Chairman and Chief Executive Officer:	Claude Majeau
Member:	J. Nelson Landry
Secretary General:	Gilles McDougall
Senior Legal Counsel:	Sylvain Audet
Legal Counsel:	Valérie Demers Jean-Arpad Français Marko Zatowkaniuk
Director, Analysis and Research:	Dr. Raphael Solomon
Economic Analyst:	Dr. Rashid Nikzad
Senior Clerk:	Nadia Campanella
Assistant Clerks:	Maryse Choquette Pingyin Roch Levac
Registry Officer:	Tina Lusignan
Manager, Corporate Services:	Nancy Laframboise
Financial and Administrative Assistant:	Jo-Anne Boucher
Technical Support Officer:	Michel Gauthier
Administrative Assistant:	Hibak Muse

Copyright Board of Canada

CHAIRMAN'S MESSAGE

I am pleased to present the 2016-17 Annual Report of the Copyright Board of Canada. The Report documents the Board's activities during the year in carrying out its mandate as an economic regulator responsible for setting tariffs that are fair and equitable to both copyright owners and the users of copyright-protected works.

As I noted in our last Annual Report, the increasing volume of the Board's workload and the fast-developing technological, economic and legal complexity of the matters it is called upon to determine, have affected the Board's ability to issue its decisions in a timely fashion. Consequently, the Board's processes need to be addressed, and I think it is important to emphasize that Management and Staff, with that need in mind and with the Member's encouragement, have been devoting considerable time and energy to that task.

In late 2016, the Standing Senate Committee on Banking, Trade and Commerce conducted hearings regarding the work of the Copyright Board. During those hearings, the Vice-Chair and CEO of the Board, Mr. Majeau, advised the Committee that the Board expects an examination of its mandate and procedures to form part of the upcoming 2017 Parliamentary Review process and that the Board will be happy to cooperate and participate in that process or any related initiatives. Mr. Majeau testified that he anticipated the Board's contribution to this review would be structured around two general themes: first, that the Board will be working in close collaboration with officials from Innovation, Science and Economic Development Canada to analyze the effective fulfillment of its mandate and, second, that the inflow of cases needs to be addressed at the source by analyzing the structures of the collective administration regimes provided for in the *Copyright Act*.

I referred in last year's Annual Report to the Board's Working Group on the Operations, Procedures and Processes of the Copyright Board, comprised of experienced lawyers who practice before the Board. Building on the feedback from that Group's efforts, the Board has broadened its efforts during the past year to develop a series of potential options designed to improve the overall timeliness and effectiveness of the tariff-setting process. It will continue these efforts, working in close cooperation with officials from Innovation, Science and Economic Development Canada and Canadian Heritage, during the upcoming year.

Among the activities outlined in this Report, I would like to highlight the following.

In August 2016, the Board completed the hearing of testimony and argument pertaining to the retransmission of distant television signals, an evolving area that the Board has not been required to address in a public hearing since 1991 and one in which the Board and the participating stakeholders have had to grapple with the potential effect of changing technology and viewer preferences. Nine collective societies as well as five broadcasting distribution undertakings were represented at the hearing, which started in January and March 2016.

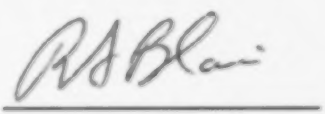
In addition, the Board issued four major decisions. The first decision dealt with the various rights that are used by the Canadian commercial radio stations when they broadcast. This case required the Board to

provide its interpretation of several new exceptions set out in the *Act* and that came into force on November 7, 2012. The second decision involved the communication to the public by telecommunication of musical works by online audiovisual services such as Netflix. The third decision concerned the levy to be collected in 2017 on the sale of blank audio recording media in respect of private copying. The fourth was an interim decision dealing with the reconsideration of the SODRAC v. CBC 2012-2016 interim licence as well as an interim licence starting in April 2016.

These decisions are summarized in the Report, as are Court's judgments pertaining to Board's decisions.

The Board also issued six licences pursuant to the provisions of the *Act* that permit the use of published works when copyright owners cannot be located. As well, Board staff assisted a number of individuals and organizations requesting a licence to locate the copyright owner thereby facilitating the use of published works.

In concluding, I must pay tribute to the contributions made by the Board's professional and support staff to the effectiveness of the Board's operations. Without their accomplished and knowledgeable assistance the Board would not have been able to carry out its responsibilities as it did over the past year. Their expertise and work ethic make the work of the Board possible.



The Honourable Robert A. Blair

MANDATE OF THE BOARD

The Copyright Board of Canada (the "Board") was established on February 1, 1989, as the successor of the Copyright Appeal Board. The Board is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective society. Moreover, the Board has the right to supervise agreements between users and licensing bodies, issue licences when the copyright owner cannot be located and may determine the compensation to be paid by a copyright owner to a user when there is a risk that the coming into force of a new copyright might adversely affect the latter.

The *Copyright Act* (the "*Act*") requires that the Board certify tariffs in the following fields: the public performance or communication of musical works and of sound recordings of musical works, the retransmission of distant television and radio signals, the reproduction of television and radio programs by educational institutions, and private copying. In other fields where rights are administered collectively, the Board can be asked by a collective society to set a tariff; if not, the Board can act as an arbitrator if the collective society and a user cannot agree on the terms and conditions of a licence.

The responsibilities of the Board under the *Act* are to:

- certify tariffs for
  - the public performance or the communication to the public by telecommunication of musical works and sound recordings;
  - the doing of any protected act mentioned in sections 3, 15, 18 and 21 of the *Act*, such as the reproduction of musical works, of sound recordings, of performances and of literary works; and,
  - the retransmission of distant television and radio signals or the reproduction and public performance by educational institutions, of radio or television news or news commentary programs and all other programs, for educational or training purposes;
- set levies for the private copying of recorded musical works;
- set royalties payable by a user to a collective society, when there is disagreement on the royalties or on the related terms and conditions;
- rule on applications for non-exclusive licences to use published works, fixed performances, published sound recordings and fixed communication signals, when the copyright owner cannot be located;
- examine agreements made between a collective society and a user which have been filed with the Board by either party, where the Commissioner of Competition considers that the agreement is contrary to the public interest;
- receive such agreements with collective societies that are filed with it by any party to those agreements within 15 days of their conclusion;
- determine the compensation to be paid by a copyright owner to a person to stop her from performing formerly unprotected acts in countries that later join the *Berne Convention*, the *Universal Convention* or the *Agreement establishing the World Trade Organization*; and
- conduct such studies with respect to the exercise of its powers as requested by the Minister of Industry.

Historical Overview

Copyright collective societies were introduced to Canada in 1925 when PRS England set up a subsidiary called the Canadian Performing Rights Society (CPRS). In 1931, the *Act* was amended in several respects. The need to register copyright assignments was abolished. Instead, CPRS had to deposit a list of all works comprising its repertoire and file tariffs with the Minister. If the Minister thought the society was acting against the public interest, he could trigger an inquiry into the activities of CPRS. Following such an inquiry, Cabinet was authorized to set the fees the society would charge.

Inquiries were held in 1932 and 1935. The second inquiry recommended the establishment of a tribunal to review, on a continuing basis and before they were effective, public performance tariffs. In 1936, the *Act* was amended to create the Copyright Appeal Board.

On February 1, 1989, the Copyright Board of Canada took over from the Copyright Appeal Board. The regime for public performance of music was continued, with a few minor modifications. The new Board also assumed jurisdiction in two new areas: the collective administration of rights other than the performing rights of musical works and the licensing of uses of published works whose owners cannot be located. Later the same year, the *Canada-US Free Trade Implementation Act* vested the Board with the power to set and apportion royalties for the newly created compulsory licensing scheme for works retransmitted on distant radio and television signals.

Bill C-32 (*An Act to amend* the *Copyright Act*) which received Royal Assent on April 25, 1997, modified the mandate of the Board by adding the responsibilities for the adoption of tariffs for the public performance and communication to the public by telecommunication of sound recordings of musical works, for the benefit of the performers of these works and of the makers of the sound recordings ("the neighbouring rights"), for the adoption of tariffs for private copying of recorded musical works, for the benefit of the rights owners in the works, the recorded performances and the sound recordings ("the home-taping regime") and for the adoption of tariffs for off-air taping and use of radio and television programs for educational or training purposes ("the educational rights").

The *Copyright Modernization Act* (Bill C-11) received Royal Assent on June 29, 2012, and many of its provisions came into force on November 7, 2012. Though this legislation does not change the mandate of the Board or the way it operates, it provides for new rights and exceptions that will affect the Board's work.

The coming into force of new distribution and making available rights for authors, performers and makers of sound recordings, and the addition of education, parody and satire as allowable fair dealing purposes may affect existing and future tariffs or licences. New or modified exceptions dealing with non-commercial user-generated content, reproductions for private purposes, program copying for the purpose of time-shifting, backup copies, ephemeral copies by broadcasting undertakings and certain activities of educational institutions, among others, may affect some uses that are or may be subject to a Board tariff.

General Powers of the Board

The Board has powers of a substantive and procedural nature. Some powers are granted to the Board expressly in the *Act* and some are implicitly recognized by the courts.

As a rule, the Board holds hearings. No hearing will be held if proceeding in writing accommodates a small user that would otherwise incur large costs. The hearing may be dispensed with on certain preliminary or interim issues. No hearing has been held to date for a request to use a work whose owner cannot be located. Information is obtained either in writing or through telephone calls.

The examination process is always the same. Tariffs come into effect on January 1. On or before the preceding March 31, the collective society must file a statement of proposed royalties which the Board then publishes in the *Canada Gazette*. Users (or, in the case of private copying, any interested person) or their representatives may object to the statement within 60 days. The collective society and the objectors present oral and written arguments. After deliberation the Board certifies the tariff, publishes it in the *Canada Gazette*, and provides written reasons for its decision.

Guidelines and Principles Influencing the Board's Decisions

The decisions the Board makes are constrained in several respects. These constraints come from sources external to the Board: the law, regulations and judicial pronouncements. Others are self-imposed, in the form of guiding principles that can be found in the Board's decisions.

Court decisions also provide a large part of the framework within which the Board operates. Most decisions focus on issues of procedure, or apply the general principles of administrative decision-making to the specific circumstances of the Board. However, the courts have also set out several substantive principles for the Board to follow or that determine the ambit of the Board's mandate or discretion.

The Board also enjoys a fair amount of discretion, especially in areas of fact or policy. In making decisions, the Board itself has used various principles or concepts. Strictly speaking, these principles are not binding on the Board. They can be challenged by anyone at any time. Indeed, the Board would illegally fetter its discretion if it considered itself bound by its previous decisions. However, these principles do offer guidance to both the Board and those who appear before it. In fact, they are essential to ensuring a desirable amount of consistency in decision-making.

Among those factors, the following are the most prevalent: the internal coherence between the various tariffs of the Board; the practical aspects such as the ease of administration to avoid tariff structures difficult to manage in a given market environment; the relative use of the relevant repertoire; the taking into account of the Canadian environment; the stability in the setting of tariffs that minimizes undesired disruption for all participants; as well as the comparisons with "proxy" markets, including with similar prices in foreign markets.

The Operations, Procedures and Processes of the Copyright Board

The need to reexamine the Board's procedures has been discussed for some time. The June 2014 report of the Standing Committee of the House of Commons on Canadian Heritage entitled *Review of the Canadian Music Industry* documents a wide consensus in two respects. First, the Board provides a valuable service to both rights holders and copyright users by ensuring payment for protected uses and by providing marketplace certainty. Second, it takes too long to render decisions, largely because of a lack of resources. The Standing Committee recommended dealing with delays ahead of the five-year review of the *Copyright Act* due in 2017. The Government preferred to leave the matter with the Board for the time being, adding that the five-year review would be "an opportune moment to consider important copyright issues, such as the broader framework in which the Copyright Board operates."

On November 26, 2012, the Board had established a committee of seasoned practitioners representing copyright users and owners to look into its operations, procedures and processes. In December 2014, the committee finalized a discussion paper dealing with two issues: the identification and disclosure of issues to be addressed during a tariff proceeding and the interrogatory process. The paper was sent to known stakeholders and posted on the Board's website in February 2015. Comments were received in March and responses in April.

In parallel to this exercise, there were a number of initiatives undertaken by the two Departments responsible for the copyright legislation: Innovation, Science and Economic Development Canada and Canadian Heritage. These initiatives deal with a number of issues related to the Copyright Board and its processes. In view of these, the Board decided to hold on issuing a decision with respect to the Committee's recommendations, so that it can benefit from the Departments' initiatives.

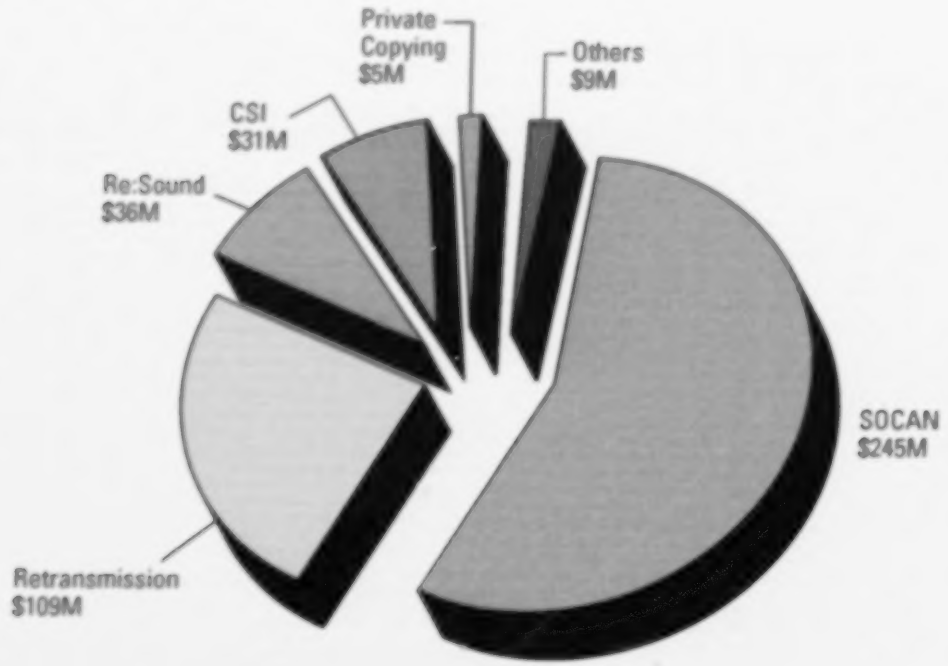
Most recently, in November 2016, the Standing Senate Committee on Banking, Trade and Commerce undertook to study, and make recommendations, on the operation and practices of the Copyright Board of Canada. As part of this study, many witnesses were heard including the Vice-Chair and CEO of the Board, who undertook to work in close collaboration with the two Departments involved with the objective to enhance the effective fulfillment of the Board's mandate.

Total Royalties Generated by the Board's Tariffs

The total amount of royalties generated by the tariffs the Board certifies is estimated at $435 million for the year 2015. The following chart shows the allocation of these royalties among the various collective societies.

SOCAN receives the most important share of these royalties, corresponding to more than half of the total. The nine retransmission collectives together come in second, followed by CSI and Re:Sound.

Royalties Generated by the Board's Tariffs, 2015 by Collective Societies



ORGANIZATION OF THE BOARD

Board members are appointed by the Governor in Council to hold office during good behaviour for a term not exceeding five years. They may be reappointed once.

The *Act* states that the Chairman must be a judge, either sitting or retired, of a superior, county or district court. The Chairman directs the work of the Board and apportions its caseload among the members.

Chairman

The Honourable Robert A. Blair was appointed Chairman of the Board in May 2015 for a five-year term. The Honourable Robert A. Blair was appointed to the Court of Appeal for Ontario in November 2003, after serving for 12 years as a trial judge on the Superior Court. In both capacities, he has presided over matters involving almost all areas of the law, with a particular emphasis as a trial judge on cases on the Commercial List in Toronto and a continuing involvement with such cases at the appellate level. He received his B.A. (Hons.) from Queen's University in 1965 and his LL.B. from University of Toronto Law School in 1968. He was called to the Bar in Ontario in 1970 and received his Queen's Counsel designation in 1982.

The *Act* also designates the Vice-Chairman as Chief Executive Officer of the Board, exercising direction over the Board and supervision of its staff.

Vice-Chairman & Chief Executive Officer

Claude Majeau was appointed as full-time Vice-Chairman and Chief Executive Officer in August 2009 for a five-year term and reappointed in 2014 for a three-year term. He occupied the position of Secretary General of the Copyright Board from 1993 until his appointment as Vice-Chairman. Before joining the Board, Mr. Majeau worked for the Department of Communications of Canada from 1987 to 1993 as Director (Communications and Culture) for the Quebec Region. From 1984 to 1987, he was Chief of Staff to the Deputy Minister of the same department. Before 1984, he occupied various positions dealing with communications and cultural industries and public policy. Mr. Majeau earned an LL.B. from the Université du Québec à Montréal in 1977 and has been a member of the Barreau du Québec since 1979.

Member

J. Nelson Landry was appointed in February 2010 as a part-time member for five years and reappointed in 2015 for a three-year term. Mr. Landry has served as a domain name arbitrator for the World Intellectual Property Organisation (WIPO) since 2001. From 2002 to 2005, he was an instructor for the Patent Agent Training Course – Infringement and Validity at the Intellectual Property Institute of Canada. In 2003, he gave a management of intellectual property course at the MBA level at the *Hautes Études Commerciales* of the *Université de Montréal* and from 1969 to 2002, Mr. Landry was a lawyer at Ogilvy Renault where he retired as senior partner in 2002. Mr. Landry obtained a B.A. in 1959 and a BSc in 1965 from the *Université de Montréal*. He also graduated with a B.C.L. from McGill University in 1968 and was called to the Quebec Bar in 1969.

The Board is a micro organization, consisting of 16 employees organized in five functional groups:

- Secretariat
- Research and Analysis Group
- Legal Analysis Group
- Ministerial Services
- Technical Support

Note: *Detailed information on the Board's resources, including financial statements, can be found in its Report on Plans and Priorities for 2016-2017 (Part III of the Estimates) and the Performance Report for 2016-2017. These documents are or will soon be available on the Board's website (**www.cb-cda.gc.ca**).*

COLLECTIVE ADMINISTRATION OF COPYRIGHT

In Canada, the collective administration of copyright is supported by a number of collective societies. These collective societies are organizations that administer the rights of several copyright owners. They can grant permission to use their works and set the conditions for that use. Some collective societies are affiliated with foreign societies; this allows them to represent foreign copyright owners as well.

The Board regulates Canadian collective administration organizations through one of the following regulatory regimes.

Public Performance of Music

The provisions beginning with section 67 of the *Act* deal with the public performance of music or the communication of music to the public by telecommunication. Public performance of music means any musical work that is sung or performed in public, whether it be in a concert hall, a restaurant, a hockey stadium, a public plaza or other venue. Communication of music to the public by telecommunication means any transmission by radio, television (including cable and satellite) or the Internet. Collective societies collect royalties from users based on the tariffs certified by the Board.

Two collective societies operate under this regime:

- The Society of Composers, Authors and Music Publishers of Canada (SOCAN) administers the right to perform in public or to communicate to the public by telecommunication musical works;
- Re:Sound Music Licensing Company (Re:Sound) collects royalties for the equitable remuneration of performers and makers for the performance or communication of sound recordings of musical works.

General Regime

Sections 70.12 to 70.191 of the *Act* give collective societies that are not subject to a specific regime the option of filing a proposed tariff with the Board. The review and certification process for such tariffs is the same as under the specific regimes.

There are a number of collective societies operating under this regime, including the following:

- Access Copyright, The Canadian Copyright Licensing Agency (Access Copyright) represents writers, publishers and other creators for the reproduction rights of works published in books, magazines, journals and newspapers. It licenses uses in all provinces except Quebec;
- The *Société québécoise de gestion collective des droits de reproduction* (COPIBEC) represents similar rights owners as Access Copyright, but for uses in Quebec;
- Artisti is the collective society founded by the *Union des artistes* (UDA) for the remuneration of performers' rights;
- ACTRA Recording Artists' Collecting Society (ACTRA RACS), a division of ACTRA Performers' Rights Society (ACTRA PRS), collects and distributes equitable remuneration for eligible recording artists;
- CONNECT Music Licensing (formerly known as Audio-Video Licensing Agency (AVLA)) (CONNECT) administers licences in Canada for the reproduction of sound

recordings, and the reproduction and broadcast of music videos on behalf of all the major record companies, many independent labels, as well as artists and producers;

- The *Société de gestion collective des droits des producteurs de phonogrammes et vidéogrammes du Québec* (SOPROQ) administers similar rights as CONNECT. Its members are mostly Francophone independent record labels;
- The Canadian Broadcasters Rights Agency (CBRA) claims royalties for programming and excerpts of programming owned by commercial radio and television stations and networks in Canada;
- The Canadian Musical Reproduction Rights Agency (CMRRA) collects royalties on behalf of Canadian and U.S. publishers for the reproduction rights of musical works in Canada;
- *The Musicians' Rights Organization Canada* (MROC) collects royalties on behalf of musicians and vocalists for the public performance of their recorded works;
- The Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) administers royalties stemming from the reproduction of musical works. It represents members mostly from the province of Quebec; and,
- CMRRA/SODRAC Inc. (CSI), a joint venture of CMRRA and SODRAC, licenses the reproduction rights of songwriters and music publishers whose songs are active in the Canadian marketplace.

More details about other collective societies operating under this regime can be found on the Board's website at: http://www.cb-cda.gc.ca/societies-societes/index-e.html.

Retransmission of Distant Signals

Sections 71 to 76 of the *Act* provide for royalties to be paid by cable companies and other retransmitters for the retransmission of distant television and radio signals. The Board sets the royalties and allocates them among the collective societies representing copyright owners whose works are retransmitted.

There are currently nine collective societies receiving and distributing royalties under this regime:

- The Border Broadcasters Inc. (BBI) represents the U.S. border broadcasters;
- The Canadian Broadcasters Rights Agency Inc. (CBRA) represents commercial radio and television stations and networks in Canada;
- The Canadian Retransmission Collective (CRC) represents all PBS and TVOntario programming (producers) as well as owners of motion pictures and television drama and comedy programs produced outside the United States;
- The Canadian Retransmission Right Association (CRRA) represents the Canadian Broadcasting Corporation (CBC), the American Broadcasting Company (ABC), the National Broadcasting Company (NBC), the Columbia Broadcasting System (CBS) and *Télé-Québec;*
- The Copyright Collective of Canada (CCC) represents copyright owners (producers and distributors) of the U.S. independent motion picture and television production industry for all drama and comedy programming;

- The Direct Response Television Collective Inc. (DRTVC) claims royalties for all television programs and underlying works in the form of direct response television programming (defined as "infomercials");
- FWS Joint Sports Claimants Inc. (FWS) represents the National Hockey League, the National Basketball Association and the Canadian, National and American Football Leagues;
- The Major League Baseball Collective of Canada Inc. (MLB) claims royalties arising out of the retransmission of major league baseball games in Canada; and,
- SOCAN, representing owners of the copyright in the music that is integrated in the programming carried in retransmitted radio and television signals.

Educational Rights

Under sections 29.6, 29.7 and 29.9 of the *Act*, educational institutions can copy and perform news and news commentaries and keep and perform the copy for one year without having to pay royalties; after that, they must pay the royalties and comply with the conditions set by the Copyright Board in a tariff, pursuant to sections 71 to 76 of the *Act*.

There is currently however no collective society representing the interests of copyright owners for this regime.

Private Copying

The private copying regime, as set in sections 79 to 88 of the *Act*, entitles an individual to make copies (a "private copy") of sound recordings of musical works for that person's personal use. In return, those who make or import recording media ordinarily used to make private copies are required to pay a levy on each such medium. The Board sets the levy and designates a single collecting body to which all royalties are paid.

The Canadian Private Copying Collective (CPCC) is the collective society for the private copying levy, collecting royalties for the benefit of eligible authors, performers and producers. The member collectives of the CPCC are CMRRA, Re:Sound, SODRAC and SOCAN.

Arbitration Proceedings

Pursuant to section 70.2 of the *Act*, when a collective society and a user are unable to agree on the terms of the licence and on application filed by either one of them, the Board can set the royalties and the related terms and conditions of a licence for the use of the repertoire of a collective society to which section 70.1 applies.

TARIFFS PROPOSED BY COLLECTIVE SOCIETIES

In 2017, the following collective societies filed their proposed statements of royalties to be collected in 2018 and beyond:

ACCESS COPYRIGHT

- Proposed tariff for the reproduction, communication to the public by telecommunication, making available to the public, and authorization of such acts by post-secondary educational institutions and persons acting under their authority, 2018-2020.

ARTISTI

- Proposed tariff for the reproduction of performers' performances made by the CBC in connection with its over-the-air radio broadcasting, its simulcasting of an over-the-air radio signal and its webcasting activities on its webradios, 2018-2020.
- Proposed tariff for the reproduction of performers' performances made by pay audio services, 2018-2020.
- Proposed tariff for the reproduction of performers' performances made by satellite radio services, 2018-2020.
- Proposed tariff for the reproduction of performers' performances made by commercial radio stations, 2018.

CMRRA

- Proposed tariff for the reproduction of musical works embodied in music videos by online music services, 2018 (Tariff 4).
- Proposed tariff for the reproduction of musical works by commercial television stations, 2018 (Tariff 5).
- Proposed tariff for the reproduction of musical works by the television services of the CBC, 2018 (Tariff 6).
- Proposed tariff for the reproduction of musical works by audiovisual services, 2018 (Tariff 7).

CONNECT/SOPROQ

- Proposed tariff for the reproduction of sound recordings by commercial radio stations, 2018.

CPCC

- Proposed levies to be collected on the sale of blank audio recording media, 2018 and 2019.

CSI

- Proposed tariff for the reproduction of musical works by commercial radio stations, 2018.
- Proposed tariff for the reproduction of musical works by non-commercial radio stations, 2018.
- Proposed tariff for the reproduction of musical works by online music services, 2018.

Re:Sound

- Proposed tariff for the communication to the public by telecommunication and the performance in public of published sound recordings embodying musical works by commercial radio, 2018-2020 (Tariff 1.A).
- Proposed tariff for the performance in public or the communication to the public by telecommunication of published sound recordings embodying musical works by background music suppliers, 2018 (Tariff 3.A).

- Proposed tariff for the performance in public or the communication to the public by telecommunication of published sound recordings embodying musical works for background music, 2018 (Tariff 3.B).
- Proposed tariff for the performance in public or the communication to the public by telecommunication of published sound recordings embodying musical works for the use of recorded music to accompany fitness activities, 2018-2022 (Tariff 6.B).
- Proposed tariff for the communication to the public by telecommunication of published sound recordings embodying musical works in respect of non-interactive and semi-interactive webcasts, 2018 (Tariff 8).

SOCAN

- Proposed tariffs for the public performance or the communication to the public by telecommunication of musical or dramatico-musical works, including the right to make such works available to the public by telecommunication, 2018, 2018-2020:

  For 2018:

  - Tariff 1.A – Commercial Radio
  - Tariff 1.B – Non-Commercial Radio other than the CBC
  - Tariff 1.C – CBC Radio
  - Tariff 2.A – Commercial Television Stations
  - Tariff 2.B – Ontario Educational Communications Authority
  - Tariff 2.C – *Société de télédiffusion du Québec*
  - Tariff 2.D – Canadian Broadcasting Corporation
  - Tariff 3.A – Cabarets, Cafes, Clubs, etc. – Live Music
  - Tariff 4.A.1 – Popular Music Concerts – Per Event Licence
  - Tariff 4.A.2 – Popular Music Concerts – Annual Licence
  - Tariff 4.B.1 – Classical Music Concerts – Per Concert Licence
  - Tariff 4.B.2 – Classical Music Concerts – Annual Licence for Orchestras
  - Tariff 4.B.3 – Classical Music Concerts – Annual licence for Presenting Organizations
  - Tariff 6 – Motion Picture Theatres
  - Tariff 8 – Receptions, Conventions, Assemblies and Fashion Shows
  - Tariff 9 – Sports Events
  - Tariff 15.A – Background Music
  - Tariff 15.B – Telephone Music on Hold
  - Tariff 16 – Background Music Suppliers
  - Tariff 17 – Transmission of Pay, Specialty and other Television Services by Distribution Undertakings
  - Tariff 18 – Recorded Music for Dancing
  - Tariff 19 – Fitness Activities and Dance Instruction
  - Tariff 22.A – Internet – Online Music Services
  - Tariff 22.B – Internet – Commercial Radio, Satellite Radio and Pay Audio
  - Tariff 22.C – Internet – Other Audio Websites
  - Tariff 22.D.1 – Internet – Audiovisual Content
  - Tariff 22.D.2 – Internet – User-Generated Content
  - Tariff 22.E – Internet – Canadian Broadcasting Corporation
  - Tariff 22.G – Internet – Game Sites
  - Tariff 24 – Ringtones and Ringbacks
  - Tariff 26 – Pay Audio Services

For 2018-2020:

- Tariff 3.B – Cabarets, cafés, clubs, etc. – Recorded Music Accompanying Live Entertainment
- Tariff 3.C – Cabarets, cafés, clubs, etc. – Adult Entertainment Clubs
- Tariff 5.A – Exhibitions and Fairs, licence to perform in public
- Tariff 5.B – Exhibitions and Fairs, licence for attendance at musical concerts
- Tariff 7 – Skating Rinks
- Tariff 10.A – Strolling Musicians and Buskers; Recorded Music
- Tariff 10.B – Marching Bands; Floats with Music
- Tariff 11.A – Circuses, Ice Shows, Fireworks Displays, Sound and Light Shows and Similar Events
- Tariff 11.B – Comedy Shows and Magic Shows
- Tariff 12.A – Theme Parks, Ontario Place Corporation and Similar Operations
- Tariff 12.B – Paramount Canada's Wonderland Inc. and Similar Operations
- Tariff 13.A – Public Conveyances – Aircraft
- Tariff 13.B – Public Conveyances – Passenger Ships
- Tariff 13.C – Railroad Trains, Buses and other Public Conveyances, Excluding Aircraft and Passenger Ships
- Tariff 14 – Performance of an Individual Work
- Tariff 20 – Karaoke Bars and Similar Establishments
- Tariff 21 – Recreational Facilities Operated by a Municipality, School, College, University, Agricultural Society or Similar Community Organizations
- Tariff 23 – Hotel and Motel In-Room Services

SODRAC

- Proposed tariff for the reproduction of musical works embedded in musical audiovisual works for their transmission by a service, 2018 (Tariff 6).
- Proposed tariff for the reproduction of musical works embedded in audiovisual works for their transmission by a service, 2018 (Tariff 7).
- Proposed tariff for the reproduction of musical works by commercial television stations, 2018 (Tariff 8).

REQUESTS FOR ARBITRATION

The Board received one request for arbitration in the year 2016-17.

On March 31, 2017, SODRAC requested that the Board fix the terms of the CBC/SRC licence with respect to the reproduction of musical works for the period April 1, 2017 to March 31, 2018. SODRAC also asked that the consideration of this request be merged to the ongoing consideration of the licence for the period 2012-2017.

At the interim level, SODRAC asked that the Board extend after April 1, 2017 and until its final decision the interim conditions established in the June 27, 2016 decision.

HEARINGS

In January and March 2016, the Board held a hearing concerning the retransmission of distant television signals in Canada, for the years 2014 to 2018. Nine collective societies as well as five broadcasting distribution undertakings were represented at the hearing. Parties made their oral argumentation for this file in August 2016.

DECISIONS

During the fiscal year 2016-17, the following decisions were rendered:

April 21, 2016 – Commercial radio tariff – SOCAN (2011-2013); Re:Sound (2012-2014); CSI (2012-2013); Connect/SOPROQ (2012-2017); Artisti (2012-2014)

A Canadian radio station that broadcasts recorded music off a server must account for six rights. These are:

- the exclusive right to communicate a musical work to the public by telecommunication, administered by the Society of Composers, Authors and Music Publishers of Canada (SOCAN);
- the exclusive right to reproduce a work, administered by the Canadian Musical Reproduction Rights Agency (CMRRA) and the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) when acting separately, or by CMRRA/SODRAC Inc. (CSI) when CMRRA and SODRAC are acting together;
- the exclusive right to reproduce a sound recording, administered by the Connect Music Licensing Service Inc. (Connect) and the *Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec* (SOPROQ), jointly Connect/SOPROQ;
- the exclusive right to reproduce any reproduction of an authorized fixation of a performer's performance for a purpose other than that for which the authorization was given, administered by ArtistI, ACTRA Performers' Rights Society (ACTRA PRS) and the Musicians' Rights Organization of Canada (MROC); and
- the remuneration rights that performers and makers each enjoy when a published sound recording of a musical work is communicated to the public by telecommunication, administered by Re:Sound Music Licensing Company (Re:Sound).

SOCAN, Re:Sound, CSI, Connect/SOPROQ, and ArtistI filed proposed tariffs separately, for the years 2011-2013, 2012-2014, 2012-2013, 2012-2017 and 2012-2014, respectively. ACTRA PRS and MROC filed proposed statements of royalties for the reproduction of performers' performances for the years 2010 to 2013. On March 29, 2012, ACTRA PRS and MROC filed a request for intervenor status in respect of Connect/SOPROQ proposed statement of royalties for the years 2012 to 2017. On March 6, 2013, ACTRA PRS and MROC withdrew their proposed tariffs and their request for intervenor status.

Between June 26, 2009 and August 1, 2012, the Canadian Association of Broadcasters (CAB), representing the majority of Canadian private radio stations, filed timely objections to all of the above-proposed statements of royalties on behalf of its members.

Following the decision of the Supreme Court of Canada in *SOCAN v. Bell Canada*[1] ("Bell"), which clarified the concept of fair dealing, and the coming into force of new exceptions set out in the *Copyright Modernization Act*,[2] CAB filed on November 8, 2012 an application requesting that the Board 1) issue an interim decision reducing by 90 per cent the royalties paid by commercial radio stations to CSI, Connect/SOPROQ and ArtistI under the last

1. *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326.
2. *Copyright Modernization Act*, S.C. 2012, c. 20 (assented to 29 June 2012).

certified commercial radio tariffs, from November 7, 2012 until the Board renders a decision on the merits; 2) declare that as of November 7, 2012, there is no legal basis for the commercial radio reproduction tariffs; and, 3) rescind the CSI tariff as of November 7, 2012.

The Board ruled on this matter in its interim decision of December 21, 2012. It found the application on the merits to be "untenable." The Board also found that, in order to decide the issues raised by CAB, including fair dealing, substantial evidence on the scope of the protected reproduction activities by radio stations was necessary and should be integrated into a single process that would also examine all of the proposed tariffs for commercial radio. Moreover, the Board concluded that CAB's arguments could not justify a royalty reduction for an entire industry, by reason that all stations do not operate in the same way.

On January 21, 2013, the Board invited any party challenging the status quo (i.e., any aspects of the existing tariffs) to file their submissions setting out the reasons for doing so. The Board ruled on March 6, 2013 that none of the parties challenged the use of previously certified rates (including the amount of music use and the fundamental value of music) as starting points to set the royalties, although most parties proposed that adjustments be made to some of those rates.

From the collectives' perspective, changes to the status quo were based on various grounds, including the notion that a tariff should be based on the combined gross income of a common ownership group of radio stations (the Group Rate Base Model, or GRBM), revenues should account for barter or contra revenues, and market changes no longer warranted discounts in relation to the digital delivery of music to radio stations. Re:Sound further requested that the tariff include royalties for the performance of music in public entertainment places by means of any radio receiving set, as per subsection 69(2) of the *Act*.

From the broadcasters' perspective, the challenge to the status quo was essentially grounded on the November 2012 changes to the *Act* and the above-mentioned Bell case which would allegedly mean there was no legal basis for the commercial radio reproduction tariffs.

The Board agreed in part with CAB, and decided that there were three types of copies made by radio stations that qualify for an exception and for which no royalties would need to be paid: the Music Evaluation copy, the Streaming copy and the Backup copy. This resulted in a general discount of about 22 per cent to the reproduction royalty rates.

The Board also found that stations that are able to demonstrate that they comply with the requirements under the *Act* in respect of "ephemeral" reproductions could benefit from an additional, station-specific discount to account for this new statutory exception in respect of reproduction of this nature. This discount could be applied to the following types of copies: Ingest, Voice-Tracking and Live Performance.

The value of this additional discount will vary between stations depending on their degree of compliance with the statutory requirements. The Board estimates that this potential discount could result in a maximum, further reduction of about 28 per cent.

The Board did not see any other ground for deviating from the status quo. Particularly, regarding the request for royalties for public performances of sound recordings by businesses by means of a radio receiving set, pursuant to subsection 69(2) of the *Act*, the Board was of the view that such use is already accounted for. Indeed, the amount an advertiser is willing to pay a radio station is linked to the number of people and their demographics, that the advertiser expects will hear the advertisement, including listeners in business establishments. Since the copyright royalties collected from radio stations are mainly based on advertising revenues, it was logical to infer that the targeted use was already compensated for.

With respect to the GBRM, the Board rejected it for several reasons. For one, the Board considered that the switch to the GBRM model would result in dramatic increases in royalty payments from commercial radio stations. In the Board's opinion, important increases in royalties can only be examined in conjunction with the use and value of music issues, whereas the latter issues were not before the Board. Furthermore, the Board considered that it did not have proper evidence to support a change to the tariff's established tiered rates accounting for smaller stations' financial capacity. For example, no evidence was adduced to show that choices relating to music use are made on a group basis and that revenues from each individual station are allocated to a group of stations.

Both CAB and CSI et al. filed applications for judicial review before the Federal Court of Appeal of the Board's decision.

June 27, 2016 – Application to fix royalties for a licence and its related terms and conditions SODRAC v. CBC Licences [Redetermination (2008-2012); Determination (2012-2017)] – Interim Decision

This decision dealt with the reconsideration of the SODRAC versus CBC 2012-2016 interim licence. It also addressed SODRAC's application to extend the conditions established under the 2012- 2016 interim licence from April 1, 2016 until a final decision is made. CBC did not object to this application, without prejudice however to its submissions already in the record.

The 2012-2016 licence was to allow CBC to reproduce works from the SODRAC repertoire in the course of the following activities: radio and television broadcasting; synchronization; sales of programs (DVD or download); licensing of programs; Internet audio and audiovisual service; radio, television and Internet broadcast-incidental copying; and heritage conservation (archives).

On January 16, 2013, the Board rendered its interim decision and delivered the corresponding licence. On November 26, 2015, the Supreme Court of Canada (the "Court") rendered its decision in CBC v. SODRAC 2003 Inc.; the Court set aside in part the 2008-2012 licence, as well as the 2012-2016 interim licence, and remitted those decisions to the Board for reconsideration.

In this matter, SODRAC asked the Board to review the interim licence and proposed that the interim royalties for incidental television broadcast reproductions be fixed at 20 per cent of the rates prescribed in paragraphs 5.03(1)(a) and (b) of the 2008-2012 licence. The reduced rates

would be: (a) for conventional television, $200,755 per year; and (b) 0.043 per cent for RDI, 0.019 per cent for News Network and 0.069 per cent for Documentary Channel, of the service's gross monthly income. SODRAC rejected a symbolic royalty, noting that the proposed royalties were modest and reasonable.

In its response, CBC submitted that even the reduced royalties were still significant. It further argued that the Board must reconsider the 2012-2016 interim licence as a whole. In reply, SODRAC submitted that the Court set aside only the part of the interim licence concerning television and Internet broadcast-incidental royalties.

The Board disagreed with CBC on the scope of the reconsideration for the following reasons. First, radio broadcast-incidental copies were not at issue in the applications for judicial review. The Court held that the interim licence could maintain the elements of the 2008-2012 licence that had not been set aside. The only potential changes to the interim licence were television and Internet broadcast-incidental copies.

In terms of the application of the principles of technological neutrality and balance, the Board had to act on the basis of the information it has before it to establish interim royalties.

The Board decided that the interim rate proposed by SODRAC appears reasonable for the purposes of the interim licence, for several reasons. First, the 1992 SODRAC-CBC agreement included an overall amount of $520,000 per year which allowed for reproductions other than those incidental to television broadcasting. While royalties for television broadcast-incidental reproductions were not explicitly allocated, they were probably similar to the amount of $200,755 per year.

Furthermore, this discounted rate represents a reasonable "floor" value since it was proposed by SODRAC and approaches that which CBC was prepared to pay. Finally, this discounted rate reflects (i) the finding that broadcast-incidental copies engage the reproduction right and (ii) the benefits derived from digital technology.

CBC raised two points outside the scope of the reconsideration of an interim license. First, it argued that a symbolic royalty of $100 for all of its reproduction activities is justified under the new copyright exceptions in effect since November 2012 that are applicable to incidental copies. Second, it asked that the interim licence no longer include a comprehensive synchronization licence. The Board did not examine these arguments.

The Board established a single interim licence for 2012-2017, by extending on an interim basis the 2008-2012 licence, as modified at section 5.03(2) by the Federal Court of Appeal on March 31, 2014, from November 3, 2012 until the date of the Board's final decision for 2012-2017 or the date of expiration of the final licence, March 31, 2017, whichever comes first. The terms and conditions of the 2012-2017 interim licence are essentially the same as those of the 2008-2012 licence, with a few minor exceptions.

December 16, 2016 – Private Copying 2017

The Canadian Private Copying Collective (CPCC) filed with the Board a proposed tariff to be collected in 2017 on the sale of blank audio recording media, in Canada, in respect of the private copying. CPCC proposed a rate of $0.29 per CD. No one filed objections to the proposed tariff.

The evidence submitted by CPCC contained two reports. The first report, by Mr. Audley, Ms. Freeman, and Mr. Gauthier, focused on the question of whether CDs qualify as an "audio recording medium." The following variables were updated: the total number of tracks copied onto blank CDs; the percentage of all tracks copied onto blank CDs; the number of blank CDs copied by individuals; and the percentage copying events accounted for by music. For each of these variables, it provided the most recent data and a statistical forecast through the end of 2017. Using these variables, the report concluded that the use of CDs for private copying was "ordinary" as the Board had used that term in the past.

The second report by Mr. Audley, Ms. Freeman, and Mr. Gauthier updated a number of variables used in the Stohn/Audley model. This model was based on the remuneration that would typically flow to rights holders in the case of prerecorded CDs. In addition, this report contained an update of the "Music Monitor Tables" – tables which have been updated continuously since 2010.

In its Statement of Case, CPCC submitted that CDs were "ordinarily used" by individual consumers to copy music, according to a study that Mr. Benoît Gauthier conducted for CPCC (the "Music Monitor Survey"). According to Mr. Gauthier, the number of tracks projected to be copied onto blank CDs in 2017 is about 220 million; the percentage of all tracks projected to be copied onto blank CDs is about 8 per cent; the number of blank CDs projected to be bought by individuals is about 9 million; and the percentage of music copied onto blank CDs by individuals during their most recent copying event is about 33 per cent.

Over the period 2010-2016, the Board has used these four variables in different ways and with varying degrees of emphasis. The Board believed that the forecasted total number of sound recordings copied onto CDs and the forecasted total number of CDs used to reproduce sound recordings are together sufficiently significant as to outweigh the lower relative use of CDs for sound recordings. For these reasons, the Board concluded that CDs are ordinarily used by individual consumers to make reproductions of sound recordings, and qualify as an "audio recording medium."

In its Statement of Case, CPCC submitted that the levy of $0.29 per CD is fair and equitable, based on the Board's decisions in *Private Copying 2012-2014*, as well as *Private Copying 2015-2016* as support. In this matter, CPCC supported its proposed rate of $0.29 using demand-oriented pricing. By partaking in the current market for blank CDs, a significant portion of Canadian consumers are saying that they are willing to pay $0.29 for the private copying levy as part of their purchase decisions. So, the Board knew that at that quantum of levy, a sizeable portion of the Canadian public considers that the perceived value of a blank CD justifies the amount they pay, which includes payment of the $0.29 levy.

CPCC also considered the variables used in the Stohn/Audley model, and suggested that – were it to be used – the resulting levy would be higher than $0.29. The Board therefore set the levy at $0.29, as proposed by CPCC.

The Board was given no reason in this matter to revisit the apportionment of the levy amongst the colleges of rightsholders. As such, it fixed the apportionment of the levy at 58.2 per cent to authors, 23.8 per cent to performers, and 18.0 per cent to makers of sound recordings, as it did in *Private Copying 2015-2016*.

January 27, 2017 – SOCAN Tariff No. 22.D.1 – Internet – Online Audiovisual Services (2007-2013) – Redetermination

On July 18, 2014, the Board rendered a decision certifying *SOCAN Tariff No. 22.D.1 – Internet – Online Audiovisual Services (2007-2013)*. This tariff targets interactive online audiovisual services that deliver webcasts of audiovisual works to end users.

In its decision, the Board determined there was insufficient evidence to challenge the fairness of the minimum fee it certified for services that offer free trials. Due to its failure to participate in the objection process and on the delays which would necessarily occur if it were allowed to participate at a late stage of the proceedings, Netflix had not been allowed to introduce new evidence or make submissions in this respect.

On August 15, 2014, Netflix filed an application for judicial review before the Federal Court of Appeal to set aside paragraph 3(*b*) of *Tariff 22.D.1* (2007-2013), which deals with royalties for free trial subscriptions.

Netflix based its application on the ground – among others – that, essentially, it had been denied the right to be heard on paragraph 3(*b*) of *Tariff 22.D.1*, a provision which did not appear in the proposed versions of the tariff that were published in the *Canada Gazette* pursuant to paragraph 67.1(5) of the *Act*.

On December 17, 2015, the Court rendered its decision. It granted Netflix's application and set aside the Board's decision insofar as it pertains to royalties payable for the offering of free trial subscriptions.

On July 21, 2016, the Board set out a process to redetermine the royalties for free trials in accordance with the Court's decision. Parties were asked to provide submissions on the nature of the redetermination process, the composition of the panel, the nature of the evidence that would be needed to redetermine the issue, the schedule of the proceedings, and any other issue perceived as relevant to the file.

On August 22, 2016, SOCAN and Netflix requested an extension of time to October 31, 2016, to respond to the Board's notice. This would allow them to engage in discussions with each other regarding a potential resolution of the free trial issue, which would avoid a contested redetermination, and to negotiate and draft its terms and to consult with the other parties.

On October 31, 2016, the Board was informed that SOCAN and Netflix had engaged in negotiations and had agreed, with the consent of Cineplex Entertainment LP, on proposed wording to replace paragraph 3(*b*) in the certified tariff as follows:

> (*b*) For a service that offers subscriptions to end-users: 1.7% for the years 2007-2010 and 1.9% for the years 2011-2013 of the amounts paid by subscribers, subject to a minimum monthly fee of 6.8¢ for the years 2007-2010 and 7.5¢ for the years 2011-2013 per subscriber. In the case of a single, initial free trial of no more than one month's duration in any 12 month period offered to induce a prospective subscriber to enter into a paid subscription, there shall be no royalty fee payable; ("Settlement proposal")

On November 7, 2016, counsel for Bell Canada, Yahoo! Canada, Rogers Communications, and Quebecor Media Inc. (collectively "the Services") notified the Board that the Services did not object to the wording proposed by SOCAN and Netflix.

The same day, both the Canadian Association of Broadcasters and Facebook notified the Board that they took no position in respect of the Settlement proposal.

The Settlement proposal's only differences with the initially certified tariff is an additional minimum fee per subscriber and a new clause whereby any single free trial month within a 12-month subscription is royalty-free.

The Board was satisfied that all parties were given the opportunity to comment on the Settlement proposal and none opposed it. Furthermore, for the period covered, the Board considered that the Settlement proposal took into account the interests of all relevant potential users, including online audiovisual services which offer free trials such as Netflix.

Based on the foregoing, and except for a modification to clarify that the one-month free trial duration can be for a period of up to 31 days, the Board certified the tariff as agreed among the parties.

UNLOCATABLE COPYRIGHT OWNERS

Pursuant to section 77 of the *Act*, the Board may grant licences authorizing the use of published works, fixed performances, published sound recordings and fixed communication signals, if the copyright owner is unlocatable. However, the *Act* requires the applicants to make reasonable efforts to find the copyright owner. Licences granted by the Board are non-exclusive and valid only in Canada.

During the fiscal year 2016-17, 29 applications were filed with the Board, the following 6 licences were issued and one licence was extended:

- Productions J, Montreal, Quebec, for the reproduction of a musical work;
- Jérémie Dhavernas and Anaïs-Airelle Dupin, Montreal, Quebec, for the reproduction, the distribution and the communication to the public of a text in a book;
- Bryan Reingold, Carleton Place, Ontario, for the reproduction and the communication to the public by telecommunication of a photograph;
- Bibliothèque et Archives nationales du Québec (BAnQ), Montreal, Quebec, for the reproduction and communication to the public by telecommunication of periodicals;
- What the Folk, Hamilton, Ontario, for the mechanical reproduction and the communication to the public by telecommunication of a musical work;
- Les Productions Flow, Montreal, Quebec, for the reproduction, synchronization and communication to the public by telecommunication of excerpts from eight videos in a television documentary broadcast; and
- KV 265, Chicago, Illinois, U.S.A., for the use of a literary work in public performances – Extension of term.

Federal Court of Appeal

Two applications for judicial review were filed with the Federal Court of Appeal in 2016-17:

- *CAB v. SOCAN et al.* (File: A-159-16) on May 24, 2016, in respect of the *Commercial Radio Tariff (SOCAN: 2011-2013; Re:Sound: 2012-2014; CSI: 2012-2013; Connect/ SOPROQ: 2012-2017; Artisti: 2012-2014)* (Decision of the Board, April 22, 2016); and
- *CSI et al. v. CAB* (File: A-166-16) on May 24, 2016, in respect of the *Commercial Radio Tariff (SOCAN: 2011-2013; Re:Sound: 2012-2014; CSI: 2012-2013; Connect/ SOPROQ: 2012-2017; Artisti: 2012-2014)* (Decision of the Board, April 22, 2016)

These two applications were merged by the Federal Court of Appeal and will be heard together.

One decision rendered by the Federal Court of Appeal in 2016-17 was in respect of Board's decisions:

January 27, 2017 – *Access Copyright v. British Columbia (Education)* 2017 FCA 16, in respect of Access Copyright Tariff for elementary and secondary schools for the years 2010 to 2015

On February 19, 2016, the Board rendered its decision with respect to the statement of royalties to be collected by Access Copyright for the reprographic reproduction of works in its repertoire by elementary and secondary schools in Canada, excluding Quebec, for the years 2010 to 2015.

Access sought judicial review of that decision before the Federal Court of Appeal.

First, it argued that the Board erred in its determination of its repertoire and, more specifically, that it ignored expert evidence filed by Access for the purpose of correcting a report it has previously filed and of clarifying the breadth of its repertoire.

Second, Access argued that the Board erred when it deducted from the volume of compensable copying copies of one or two pages of a book on the basis that such copying did not involve the reproduction of a substantial part of the work under section 3 of the *Copyright Act*. Access argued that the Board could not adopt a bright-line quantitative rule in this respect.

Finally, Access contended that the Board had erred in its application of the burden of proof, that it had breached procedural fairness, that the methodology it had used to derive the rates was unreasonable and that it had misapplied four fair dealing factors.

Findings of the Court

With respect to the issue of repertoire, in response to questions asked by the Board in the course of the proceeding, Access explained that a document it has previously filed with the Board contained coding errors, and that those errors have the effect of underestimating the extent of its repertoire. Later, Access filed an expert report the purpose of which was to quantify the impact of the coding errors contained in the former report and the degree of underestimation of the works in its repertoire.

Despite the foregoing, in its decision, the Board noted that Access had not provided evidence of the impact of the coding errors. In the Court's view, it is obvious that the

Board, through oversight, overlooked the expert's report filed to clarify this issue. Had the Board accepted the calculations put forward in the report, Access would have been entitled to a higher rate. Since it was not in a position to assess the weight to be given to this expert report, the Court sent the matter back to the Board for reconsideration of the impact of the coding errors on the rate.

With respect to the issue of substantiality, the Court concluded that the Board's finding to the effect that the reproduction of one or two pages of a book did not amount to the reproduction of a substantial part of the work was not unreasonable in the context of a tariff setting proceeding where there was no evidence on the qualitative aspect of each copy.

With respect to fair dealing, Access blamed the Board for having fashioned a methodology of its own, without having consulted the parties on this methodology. In Access' view, this was a breach of procedural fairness. The Court rejected Access' argument. The Board has to come up with its own methodology to assess fair dealing because of shortcomings in the evidence filed by the parties. The methodology is based on the analytical framework developed by the Supreme Court and it uses the data found in evidence. There is nothing unreasonable about this. Access also alleged that the methodology was unreasonable and lead to absurd results. Here too, the Court rejected this argument.

The Court also rejected Access' contention that the Board had erred in applying burden of proof and that the Objectors had not established that their dealings were fair. The Court found no error on the Board's part. It further added that the question of who bears the legal burden is rarely relevant when reaching a conclusion based on the evidence. It is usually only determinative in cases where there is no evidence at all.

Finally, the Court rejected Access' contentions that the Board had misapplied four of the six fair dealing factors, namely the amount of the dealing, the character of the dealing, alternatives to the dealing and the effect of the dealing on the work.

Consequently, the Court granted Access' application for judicial review in part, and referred the matter back to the Board, only in respect of the impact of the coding errors on its repertoire.

AGREEMENTS FILED WITH THE BOARD

Pursuant to the *Act*, collective societies and users of copyrights can agree on the royalties and related terms of licences for the use of a society's repertoire. Filing an agreement with the Board pursuant to section 70.5 of the *Act* within 15 days of its conclusion shields the parties from prosecutions pursuant to section 45 of the *Competition Act*. The same provision grants the Commissioner of Competition appointed under the *Competition Act* access to those agreements. In turn, where the Commissioner considers that such an agreement is contrary to the public interest, he may request the Board to examine it. The Board then sets the royalties and the related terms and conditions of the licence.

In 2016-17, 56 agreements were filed with the Board pursuant to section 70.5 of the *Act*.

Access Copyright filed 24 agreements granting educational institutions, language schools, non-profit associations, copy shops and other users a licence to photocopy works in its repertoire.

Copibec filed 22 agreements concluded, in particular, with various educational institutions, municipalities, non-profit associations and other users.

Access Copyright and Copibec filed one agreement jointly.

CMRRA and CBRA filed respectively three and six agreements.